Supreme Court, U. S.
FILED
FEB 6 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1119

FILM FOLLIES, INC., an Oregon corporation,

Petitioner,

v.

HARL HAAS, individually and as District Attorney for Multnomah County, Oregon; LOUIS RHINEHART, individually and as Director of Public Safety for Multnomah County, Oregon; BRUCE BAKER, individually and as Chief of Police of the City of Portland, Oregon; and LEE JOHNSON, individually and as Attorney General of the State of Oregon,

Respondents.

On Appeal from the Court of Appeals for

State of Oregon

JURISDICTIONAL STATEMENT

MARVIN S. NEPOM
J. BRADFORD SHILEY
800 Oregon National Building
Portland, Oregon 97205
Attorneys for Petitioner

INDEX

	Page
Opinion Below	2
Jurisdiction	2-3
Questions Presented	3
Constitutional and Statutory Provisions Involved	3-5
Statement of the Case	5-7
How the Federal Questions Were Raised Below	7-8
The Federal Questions are Substantial	8-9
Conclusion	9-10
Appendix A - Opinion of the Court of Appeals	A-1

TABLE OF CASES

Jenkins v. Georgia, ___U.S.___, 94 S.Ct.___,41 Law Ed. 2d 642 (1974)	8
State v. Liles, 75 Adv. Sh. 2614, ___Or.App.____, ____P2d____(1975)	7

TABLE OF STATUTES

Oregon Laws 1973, Ch. 699, §4(1) and (2)	3
ORS 167.060(10)	3

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No

FILM FOLLIES, INC., an Oregon corporation,

Petitioner,

v.

HARL HAAS, individually and as District Attorney for Multnomah County, Oregon; LOUIS RHINEHART, individually and as Director of Public Safety for Multnomah County, Oregon; BRUCE BAKER, individually and as Chief of Police of the City of Portland, Oregon; and LEE JOHNSON, individually and as Attorney General of the State of Oregon,

Respondents.

On Appeal From the Court of Appeals

for the State of Oregon

JURISDICTIONAL STATEMENT

Opinion Below

The opinion of the Court of Appeals for the State of Oregon affirming the decision of the trial court, dated August 25, 1975 is reported in 75 Or. Adv. Sh. 2932, ___P2d____(1975) and is set forth in the Appendix, infra pp. 1a.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2), this being an appeal which draws into question the validity of Oregon Law 1973, Ch. 699 on the ground that it is repugnant to the First Amendment of the Constitution of the United States.

The appellant filed a request for declaratory judgment requesting that the trial court enjoin enforcement of the statute. The trial court found against the plaintiff-appellant and dismissed the complaint. Appellant appealed to the Court of Appeals for the State of Oregon which affirmed the trial court decision

on August 25, 1975. Appellant then sought review of the decision of the Court of Appeals in the Supreme Court of Oregon. The Supreme Court of Oregon denied review on November 12, 1975. Notice of appeal was filed within ninety days of that date.

In the event that the Court does not consider appeal, the proper mode of review, appellant requests that the papers whereupon this appeal is taken be regarded and acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. §2103.

QUESTIONS PRESENTED

Is the Oregon obscenity statute in violation of the First and Fourteenth Amendments of the United States Constitution in that it is vague and overbroad?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments of the Constitution of the United States.

Also, the case involves Oregon Laws 1973, Ch. 699, (so cited because it has not yet been compiled in the Oregon Revised Statutes):

> "Section 4.(1) A person commits the crime of disseminating obscene material if he knowingly makes, exhibits, sells, delivers or provides, or offers or agrees to make, exhibit, sell, deliver or provide, or has in his possession with intent to exhibit, sell, deliver or provide any obscene writing, picture, motion picture, films, slides, drawings or other visual reproduction.
> (2) As used in subsection (1) of this section, matter is obscene if:
> (a) It depicts or describes in a patently offensive manner sadomasochistic abuse or sexual conduct;
> (b) The average person applying contemporary state standard would find the work, taken as a whole, appeals to the prurient interest in sex; and
> (c) Taken as a whole, it lacks serious literary, artistic, political or scientific value."

and:

> ORS 167.060(10): "(10) Sexual conduct means human masturbation, sexual intercourse, or

> any touching of the genitals, pubic areas or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification."

STATEMENT OF THE CASE

This case involves a suit for declaratory relief brought by the Plaintiff-Appellant corporation, a bookstore engaged in the distribution of "adult" materials, against local law enforcement authorities to enjoin the enforcement of Oregon Laws 1973, Ch. 699 and ORS 167.060(10).

In its pleadings, Plaintiff alleged that it operated a bookstore in Portland which dealt with materials which appeared to come within the definitions of sexual conduct as defined in the Oregon Statutes. As part of its business, Plaintiff ordered for sale to the general public books and photographs which depicted, by representation and description, nudity of

both men and women. Some of the material depicted touching of the buttocks by both males and females by the person pictured in an act of apparent sexual stimulation. Some of the material offered for sale depicted the touching of female breasts by both the man and woman pictured and others, both male and female, in an act of apparent sexual stimulation and gratification. All of the defendants named in the complaint have promised to enforce the provision of the obscenity statutes in Multnomah County, the location of the Plaintiff's business. Plaintiff will suffer a financial loss from the existence and threatened enforcement of the statute.

The matter was submitted to the Circuit Court of the State of Oregon for Multnomah County, the trial department, on the pleadings, and the Circuit Court declared the statute constitutional and dismissed the Complaint. Plaintiff-

Appellant appealed to the Court of Appeals for the State of Oregon which affirmed the trial court without specifically addressing the problem raised.

HOW THE FEDERAL QUESTIONS WERE RAISED BELOW

One of the alleged grounds of unconstitutionality Appellant asserted in its complaint for declaratory relief seeking the enjoining of the statute was as follows:

> "The aforementioned statutes are invalid and unconstitutional in the following particulars:
> (1) The statutory scheme is overbroad and vague in that ORS 167.060(10) defines as prohibited materials, types of material which are constitutionally protected and not subject to suppression under the First Amendment, and the Fifth Amendment of the United States Constitution as applied to the states through the Fourteenth Amendment. . ." (Complaint, Page 3, Paragraph V).

The trial court found against the Plaintiff on this ground and the Court of Appeals affirmed the trial court as follows:

"Plaintiff first asserts that Chapter 699[1] and the related definition contained in ORS 167.060(10)[2] are vague and overbroad and thus violate the First and Fourteenth Amendments to the United States Constitution.[3] Plaintiff also asserts that Oregon Laws 1973, Ch. 699, violates the "log-rolling prohibitions of Art. IV, §20 of the Oregon Constitution. We have recently ruled to the contrary in both respects. State v. Liles, 75 Adv. Sh. 2614, ___Or. App.____, ____P2d____(1975)"

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

This case involves a determination of whether or not ORS 167.060(10) in defining sexual conduct is a broader definition of those matters which may be prohibited and controlled as obscene than is permitted under the First Amendment of the United States Constitution applied to the states through the Fourteenth Amendment.

The question presented is of great concern to the Plaintiff and citizens of Oregon. The definition of sexual conduct in ORS 167.060(10) permit the State of

Oregon to regulate certain materials which are beyond the definition of that material which may be regulated pursuant to obscenity prosecutions when dissemination to adults is involved. In Jenkins v. Georgia, ____U.S.____, 94 S.Ct.____, 41 Law Ed. 2d 642 (1974), the Court gave the following examples of what a state statute could define for regulation of sexual conduct:

> "These examples include representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, and representations or descriptions of masturbations, excretory functions, lewd exhibition of genitals."

The Oregon Statute appears to regulate certain depictions of nudity and therefore goes beyond the clear limitations of Jenkins.

CONCLUSION

For the foregoing reasons, probable

jurisdiction should be noted.

Respectfully submitted

MARVIN S. NEPOM
J. BRADFORD SHILEY
800 Oregon National
Building
Portland, Oregon 97205

APPENDIX A

APPENDIX A

IN THE COURT OF APPEALS OF THE

STATE OF OREGON

FILM FOLLIES, INC., Appellant,	)	
v.	)	No. 314
HAAS ET AL, Respondents.	)	

(August 25, 1975)

Appeal from Circuit Court,
Multnomah County

Before: SCHWAB, Chief Judge, and LANGTRY and FOLEY, Judges

AFFIRMED

FOLEY, J.

In a suit for declaratory relief plaintiff contended that Oregon Laws 1973, Ch. 699 (hereafter Chapter 699), ORS 167.060(10), and ORS 167.085 violate the First and Fifth Amendments to the United States Constitution, as applied to the states through the Fourteenth Amendment, as well as Art I, §8 and Art IV, §20 of the Oregon Constitution. Plaintiff asked that defendants be enjoined from enforcing the

statutes. The circuit court declared the statutes constitutional and dismissed the complaint. Plaintiff appeals. ORS 28.070.

Plaintiff first asserts that Chapter 669[1] and the regulated definition contained in ORS 167.060(10)[2] are vague and overbroad and thus violate the First and Fourteenth Amendments to the United States Constitution.[3] Plaintiff also asserts that Oregon Laws 1973, ch 699, violates the "log-rolling" prohibitions of Art IV, §20 of the Oregon Constitution. We have recently ruled to the contrary in both respects. State v. Liles, 75 Adv Sh 2614, ___Or App ___, 537 P2d 1182 (1975).

---

[1] Oregon Laws 1973, ch 699 (so cited because it has not yet been compiled in Oregon Revised Statutes), provides:

"Section 1. Sections 2 to 4 of this Act are added to and made a part of ORS 167.060 to 167.095.

"Section 2. As used in this 1973 Act unless the context requires otherwise:

"(1) 'Live public show' means a public show in which human beings,

animals, or both appear bodily before spectators or customers.

"(2) 'Public show' means any entertainment or exhibition advertised or in some other fashion held out to be accessible to the public or member of a club, whether or not an admission or other charge is levied or collected and whether or not minors are admitted or excluded.

"Section 3. (1) It is unlawful for any person to knowingly engage in sado-masochistic abuse or sexual conduct in a live public show.

"(2) Violation of subsection (1) of this section is a Class A misdemeanor.

"(3) It is unlawful for any person to knowingly direct, manage, finance or present a live public show in which the participants engage in sado-masochistic abuse or sexual conduct.

"(4) Violation of subsection (3) of this section is a Class C felony.

"Section 4. (1) A person commits the crime of disseminating obscene material if he knowingly makes, exhibits, sells, delivers or provides, or offers or agrees to make, exhibit, sell, deliver or provide, or has in his possession with intent to exhibit, sell, deliver or provide any obscene writing, picture, motion picture, films, slides, drawings, or other visual reproduction.

"(2) As used in subsection (1) of this section, matter is obscene if:

"(a) It depicts or described in a patently offensive manner sado-masochistic abuse or sexual conduct;

"(b) The average person applying contemporary state standards would find the work, taken as a whole, appeals to the prurient interest in sex; and

"(c) Taken as a whole, it lacks serious literary, artistic, political or scientific value.

"(3) In any prosecution for a violation of this section, it shall be relevant on the issue of knowledge to prove the advertising, publicity, promotion, method of handling or labeling of the matter, including any statement on the cover or back of any book or magazine.

"(4) No employe is liable to prosecution under this section or under any city or home-rule county ordinance for exhibiting or possessing with intent to exhibit any obscene motion picture provided the employe is acting within the scope of his regular employment at a showing open to the public.

"(5) As used in this section, 'employe' means an employe as defined in subsection (3) of ORS 167.075.

"(6) Disseminating obscene material is a Class A misdemeanor.

"Section 5. ORS 167.002 is amended to read:

"167.002. As used in ORS 167.002 to 167.027, unless the context requires otherwise:

"(1) 'Place of prostitution' means any place where prostitution is practiced.

"(2) 'Prostitute' means a male or a female person who engages in sexual conduct or sexual contact for a fee.

"(3) 'Prostitution enterprise' means an arrangement whereby two or more prostitutes are organized to conduct prostitution activities.

"(4) 'Sexual conduct' means sexual intercourse or deviate sexual intercourse.

"(5) 'Sexual contact' means any touching of the sexual organs or other intimate parts of a person not married to the actor for the purpose of arousing or gratifying the sexual desire of either party.

"Section 6. ORS 167.007 is amended to read:

"167.007. (1) A person commits the crime of prostitution if:

"(a) He engages in or offers or agrees to engage in sexual conduct or sexual contact in return for a fee(.); or

"(b) He pays or offers or agrees to pay a fee to engage in sexual conduct or sexual contact.

"(2) Prostitution is a Class A misdemeanor." (Brackets in original)

---

[2]ORS 167.060(10) provides:

"Sexual conduct" means human masturbation, sexual intercourse, or any touching of the genitals, pubic areas or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification."

---

[3]Although plaintiff contends that Chapter 699 is overbroad and thus violates the Due Process Clause of the Fifth Amendment we assume, since this case is based on state action, that the intended reference is to the Due Process Clause of the Fourteenth Amendment.

Two issues not raised in State v. Liles, supra, remain. Plaintiff contends that ORS 167.085(3) violates the First and Fourteenth Amendments in that it places upon the defendant in an obscenity case the burden or proving the material in question has serious value and therefore is not obscene.

ORS 167.085 provides, in pertinent part:

> "In any prosecution under ORS 167.065 to 167.080, it is an affirmative defense for the defendant to prove:
>
> " * * * * *
>
> "(3) That the defendant was charged with the sale, showing, exhibition or display of an item, those portions of which might otherwise be contraband forming merely an incidental part of an otherwise nonoffending whole, and serving some legitimate purpose therein other than titillation.
>
> "* * * * *."

In State v. Watson, 243 Or 454, 414 P2d 337 (1966), the Oregon Supreme Court considered a similar provision in ORS

167.151(3) (repealed, Oregon Laws 1971, ch. 743, §432) which provided in reference to sections prohibiting the dissemination of obscenity:

> "In any prosecution for an offense under this section, evidence shall be admissible, as relevant to a determination of whether or not the predominant theme of the matter appeals to prurient interest, to show artistic, literary, scientific or educational merit of the matter."

The Supreme Court noted in a footnote that this provision read "as if the presence of literary merit is an affirmative defense" but the court stated that the burden "rests upon the state to prove all the necessary elements of obscenity." 243 Or at 456.[4] In light of our "duty to give an act a constitutional construction if it can be done without wrenching the meaning of words," State v. Jackson, 224 Or 337, 345, 356 P2d 495 (1960), we place a similar interpretation on ORS 167.085(3). Section 4(2) of

---

[4]This position was reiterated in State v. Childs, 252 Or 91, 102, 447 P2d 304 (1968)

cert denied 394 US 931 (1969). See also, n 6, infra.

Chapter 699 describes the elements of obscenity, which the state must prove beyond a reasonable doubt. Even if ORS 167.085(3) does apply to Chapter 699,[5] the state still has the burden of proving beyond a reasonable doubt that the material is obscene.

The remaining issue is whether Art I, §8 of the Oregon Constitution provides broader protection in speech-related ares than the First Amendment to the United States Constitution. Article I, §8 provides:

> "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."

---

[5]The obscenity statutes in general are included in ORS 167.060 to 167.095 and Chapter 699 provides that its obscenity provisions are "added to and made a part of ORS 167.060 to 167.095."

However, ORS 167.085 relates only to prosecutions under ORS 167.065 to 167.080, all of which, prior to the addition of Chapter 699, dealt only with the furnishing of obscenity to minors; ORS 167.085 is probably limited to such prosecutions.

Plaintiffs raised the issue of the constitutionality of ORS 167.085(3) in a separate paragraph of their complaint and had standing but failed to raise the issue whether or not it is limited to furnishing obscenity to minors. We therefore do not need to decide whether it is so limited.

In its most recent decision on the subject, State v. Childs,[6] the Oregon Supreme Court said:

> "We realize that we could construe the freedom of expression provision of the Oregon Constitution, Art. I, §8, as providing greater freedom of expression than that of the First Amendment to the United States Constitution. We do not believe there is any legal basis for such a construction." 252 Or at 99.[7]

---

[6]The conviction in State v. Childs, 252 Or. 91, 447 P2d 304 (1968), cert denied 394 US 931 (1969), has subsequently been reversed through federal habeas corpus proceedings. Childs v. State of Oregon, 300 F Supp 649, 650 (D Or 1969) (holding matter not obscene), reversed 431 F2d 272 (9th Cir 1970) (holding matter to be obscene), reversed 401 US 1006 (1971).

[7] We note that the Oregon Supreme Court has since decided that certain Oregon campaign spending statutes violate Art I, §§8 and 26, of the Oregon Constitution. Based on this determination, the court found it unnecessary to decide the Federal First Amendment issues. Deras v. Myers, 75 Adv Sh 1745, ___Or___, 535 P2d 541 (1975). It is not entirely clear whether this represents a willingness to take a more expansive view of Article I, §8, than the U.S. Supreme Court takes of the First Amendment. In another recent opinion, however, our Supreme Court decided, for several reasons, to interpret Art I, §9 of the Oregon Constitution in the same manner that the United States Supreme Court interprets the Fourth Amendment to the U.S. Constitution. State v. Florance, 99 Adv Sh 1997, ___ Or ___, 527 P2d 1202 (1974)

We have already determined that Chapter 699 does not violate the First Amendment to the United States Constitution. State v. Liles, supra. In light of the court's statement in Childs, it follows that Chapter 699 does not violate Art I, §8 of the Oregon Constitution.

Affirmed.